Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina, who are sued in their official capacity only

Appellants,

v.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, a Washington State Agency

Appellee.

APPELLEE'S MOTION TO AFFIRM OR DISMISS PURSUANT TO RULE 16

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
ROBERT C. HOWISON, JR.,
Special Assistant Attorney General
JAMES ARNEIL,
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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the Washington State Apple Advertising Commission, a Washington state agency, appellee, files this Motion to Affirm or Dismiss the appeal in this action.

OPINION BELOW

The opinion of the three-judge District Court appears in 408 F. Supp. 857 (E.D.N.C. 1976) and

is included in Appendix A of the jurisdictional statement filed by James E. Holshouser, *et al.*

APPELLEE'S POSITION

The appellee, Washington State Apple Advertising Commission, a Washington state agency, respectfully submits that the questions presented by the appellants' jurisdictional statement do not constitute substantial federal questions which warrant consideration by this Court.

STATEMENT OF THE CASE

The North Carolina General Statute § 106-189.1 prohibits the displaying of any grade other than the applicable U.S. grade on closed containers of apples sold, offered for sale, or shipped into North Carolina. North Carolina has not statutory requirement for the labeling or grading of apples in open containers, which is the manner in which most apples grown in North Carolina are sold in that state. The State of Washington is a major producer of apples in the United States and accounts for 50% of the interstate shipment of apples. The Washington apples are graded in accordance with Washington state apple grades, which equal or exceed in every particular the comparable grading requirement for U.S. grades. The Washington grades have been used for 60 years and are well accepted in the apple trade. Approximately $2,000,000 worth of Washington apples annually are shipped directly

into the State of North Carolina, with an additional 30-40% indirectly shipped into the state. The Apple Commission expends in excess of $25,000 on the advertising of Washington apples and brands within the State of North Carolina. The Washington grades appear on the closed containers which are shipped to wholesalers and are thus available to wholesalers and retailers to identify the products. Most retail purchases are made in quantities of less than a box, and thus the grade marking on the containers is not normally directly available to the consumer. While 13 states have state apple grades, only Washington and six other states use state grades for apples shipped into North Carolina, and only Washington extensively uses its state grades.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The appellants' jurisdictional statement sets forth five questions that they allege to constitute substantial federal questions. (pp. 3-6) We will respond to those questions separately and as to all of those questions we assert that none of them present principles of federal law which warrant consideration by this court.

A. The appellants have contended that the appellee lacks standing to maintain this suit.

The Commission has been created by Washington state law as a state agency (chapter 15.24 Re-

vised Code of Washington) and is directed by the legislature to conduct comprehensive and extensive research, advertising and educational campaigns for the marketing of Washington apples. Washington statute RCW 15.24.070(8) expressly authorizes the appellee Commission to institute suits. The question of standing was explicitly considered by the three-judge court, which concluded that the Commission had standing, and we submit that this question was correctly resolved by the trial court and does not present a federal question of sufficient magnitude to warrant consideration by this court.

B. The appellants allege a lack of the jurisdictional $10,000 amount under 28 USC § 131.

The trial court specifically considered that contention and rejected it. The trial court observed that over $2,000,000 of Washington apples are shipped directly into North Carolina with an additional 30-40% being indirectly shipped. (F.F. # 4) Further, in excess of $25,000 was spent on advertising of Washington apples in the State of North Carolina for the 1974 crop (F.F. # 5). The trial court also found that the North Carolina statute places additional economic burdens on the processing of Washington apples. (F.F. # 10) Again, we respectfully submit that the question was correctly resolved by the trial court and does not raise a federal question warranting consideration by this court.

C. The appellants claim that invalidation of the statute as it applies to Washington state grade apples has impaired the state's ability to protect its citizens in the purchase of apples.

The record in this proceeding clearly establishes that the Washington state apples are graded at standards which meet or exceed comparable U.S. grades. Further, the decree entered in this matter does not enjoin the enforcement of the North Carolina statute as to apples from states which may have grading standards inferior to those of the U.S. grades. It only enjoins its enforcement as to Washington apples in closed containers. As indicated in the statement of the case, the grade markings on the boxes are for the purpose of identification to wholesalers and retailers. The overwhelming majority of apples sold in such containers are sold to the public in quantities of less than a box, and therefore are placed in containers; i.e., bags, etc., which do not display the box marking of the Washington grade markings. Hence, the consumer is not confused by the presence of the Washington grade, and the record indicates that the retailers and wholesalers desire the information regarding the Washington grades, and that the absence of that information would interject confusion rather than eliminate the same. We submit that the limited nature of the judgment entered in this matter does not present a substantial federal question warranting consideration by the court.

D. **The appellants allege that the District Court decision has ignored the United States Department of Agriculture's recommendation for uniformity in grading nomenclature.**

The appellants make reference to a report prepared for the Department of Agriculture in August of 1972, which has not been implemented by the adoption of any regulations by the United States Department of Agriculture. Further, the record in this proceeding makes clear, by a letter from the Assistant Secretary of the United States Department of Agriculture, that the United States Department of Agriculture does not propose to take any action which would lead to the elimination of state grades for apples in those states where its industry believes them to be of value, and further indicated that he could appreciate the desire to maintain the Washington state apple grades since they are well-established. The Assistant Secretary further indicated that by displaying both the state and federal grades on the container the quality problem of those states where the grades were inferior to the U.S. would be eliminated. Thus, there is no conflict between the United States agricultural statutes or regulations and the use of Washington grades on Washington apples. Clearly, a report issued in 1972 with no affirmative action to implement the same coupled with the fact that Congress has not acted to preempt state grading clearly indicates that the

appellants' contention does not give rise to any substantial federal question warranting review by this Court.

E. **The appellants have alleged that the District Court order has disrupted their efforts to maintain reasonable control over the branding of apples shipped into or sold within the State of North Carolina in closed containers.**

In response, the District Court did not invalidate the statute in its entirety but rather invalidated the statute insofar as it could apply to prohibit the display of Washington state grades which the record has established are equal to or exceed in all respects the U.S. grades referred to in the statute. Hence, any other state distributing apples in the State of North Carolina will be required to show that their grades are equal to or exceed the requirements of U.S. grades and the judgment in this action does not open the way for all marketing states to ship apples into North Carolina using misleading, deceptive or inferior state grades.

CONCLUSION

For the reasons stated above, the appellee submits that no substantial federal questions warranting review by this Court are presented and, therefore, we request that the Court affirm the decision of the three-judge court.

DATED this 13th day of August, 1976.

SLADE GORTON,
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I hereby certify that on this 13th day of August, 1976, three copies of the Appellee's Motion to Affirm or Dismiss pursuant to Rule 16 were mailed, postage paid, to Rufus L. Edmisten, Attorney General of the State of North Carolina, N.C. Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602 and to John R. Jordan, Jr., P.O. Box 709, Raleigh, North Carolina 27602, counsel for appellants. I further certify that all parties required to be served have been served.

EDWARD B. MACKIE,
Deputy Attorney General

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